



**Energy Policy Act of 2005 – Section 1835  
Split Estate  
Federal Oil and Gas Leasing and  
Development Practices**

**A Report to Congress**

**December 2006**

## Table of Contents

I.	Executive Summary.....	1
II.	Energy Policy Act of 2005, Section 1835 .....	3
III.	Rights, Responsibilities, Statutes, Regulations and Policies.....	4
	A. Overview .....	4
	B. Comparison of Rights and Responsibilities .....	5
	C. Current and Proposed Statutes, Regulations, and Policies .....	5
	D. Comparison of the Surface Owner Consent Provisions in Section 714 of the Surface Mining Control and Reclamation Act of 1977 .....	6
IV.	Consultation.....	7
	A. Overview of the Consultation Process.....	7
	B. Summary of Issues .....	8
	C. Effects on Privately Owned Surface (required) .....	9
V.	Recommendations .....	11
	A. Recommended Changes by Category and Issue .....	11
	B. Overview.....	11
	1. Awareness.....	12
	2. Land Use Planning .....	13
	3. Leasing .....	13
	4. Application for Permit to Drill (APD).....	14
	5. Best Management Practices (BMPs).....	16
	6. Surface Use Agreements.....	16
	7. Inspection and Enforcement.....	17
	8. Reclamation.....	18
VI.	Issues and Recommendations Raised, But Not Adopted as Implementation Actions .....	19
Appendices		
Appendix A	Comparison of the Rights and Responsibilities.....	A-1
Appendix B	Current and Proposed Statutes, Regulations and Policies.....	B-1
Appendix C	Comparison of the surface owner Consent Provisions in Section 714 of the Surface Mining Control and Reclamation Act of 1977 .....	C-1
Appendix D	Listening Session Attendance .....	D-1
Appendix E	Summary of Issues and Recommendations: E-Mail .....	E-1
Appendix F	Summary of Issues and Recommendations: Listening Sessions .....	F-1

## I. Executive Summary

*There is now a “New West” ...with new owners paying high prices for the beauty, solitude and other aesthetic values and they will not wait while those are damaged or destroyed.<sup>1</sup>*

-- Bill Humphries, Lindrith, New Mexico

*The resumption of high levels of exploration activities in the states of the Mountain West, coupled with transformational changes in the demographics and land use patterns in these states, has focused renewed attention on split estate situation.... The situation is not new....*

-- American Petroleum Institute

Under Section 1835 of the Energy Policy Act of 2005 (43 U.S.C. 15801), Congress directed the Secretary of the Interior to review current policies and practices with respect to management of Federal subsurface oil and gas development activities and their effects on the privately owned surface. This situation is known as split estate. Split estate lands are those on which a private or other non-Federal party owns the surface while the Federal government owns the subsurface minerals. In split estate situations, mineral rights dominate, or take precedence over, other rights associated with the property, including those associated with owning the surface.

This report documents the findings resulting from consultation on the split estate issue with affected private surface owners, the oil and gas industry, and other interested parties. The report components specified in Section 1835 include:

- A comparison of the rights and responsibilities under existing mineral and land laws of the owner of a Federal mineral lease, the private surface owner, and the Department of the Interior (Bureau of Land Management).
- A comparison of the surface owner consent provisions in Section 714 of the Surface Mining Control and Reclamation Act of 1977 (SMCRA) (30 U.S.C. 1304) concerning surface mining of Federal coal deposits and the surface owner consent provisions for oil and gas development, including coalbed natural gas production.
- The effects of oil and gas activities on privately owned surface.
- Recommendations for administrative or legislative action necessary to facilitate reasonable access for Federal oil and gas activities while addressing surface owner concerns and minimizing impacts to private surface.

Issues and recommendations outlined in this report originate from the more than 3,000 people who provided comments during a broad public outreach effort conducted between

---

<sup>1</sup> Public outreach was an important component of this report. All quotes contained within this document are derived from public comments submitted to the BLM via e-mail.

December 23, 2005, and April 1, 2006. During the outreach period, an e-mail address was provided to the public for the submission of comments. Nine listening sessions also provided opportunities for the public to directly address national, state, and local Bureau of Land Management (BLM) officials regarding their issues and recommendations.

Over the past several years, there has been extensive public interest and media attention in the management of split estate lands. Surprisingly, the listening sessions and public comments received via e-mail did not provide evidence of widespread systemic conflicts between energy companies and surface property owners. That, however, does not diminish the seriousness of this issue to those who are actually having problems with individual companies. Those problems are real, and they are very important to individual landowners. In light of intense and continuing media coverage, the attendance at the listening sessions was far less than expected. Approximately 360 members of the public (including energy industry, surface owners, organizations, and non-Federal officials) attended the 9 listening sessions and 102 provided oral comments. Some individuals chose to submit e-mail comments rather than attend the listening sessions. Three thousand two hundred and forty-eight e-mails containing comments were received; however, 3,083 of these e-mails were nearly identical, while 165 individuals provided unique submissions.

Issues identified by the public revolve around several themes, including:

- How notification of surface owners at the leasing and development stages should be conducted;
- Whether current compensation provided for under the Stock-Raising Homestead Act of 1916 or other land patents is adequate, given changes in demographics and land uses in the New West; and
- Adoption and/or adherence to those state statutes that provide greater protections to the surface owner than afforded under Federal law.

It is anticipated that all outreach, policy, and regulatory implementation actions identified in Chapter V of this report, and which are under the BLM's authority, will be implemented by the BLM. The report also outlines issues and recommendations identified by some members of the public and oil and gas industry that are not being adopted at this time. These issues and recommendations may be outside the scope of this review, may already be addressed in current policies and procedures, or are not feasible.

In addition to current Federal provisions for protecting private surface owners in split estate situations, many states have surface-owner protection laws or are in the process of considering laws that provide or will provide protection to the surface owner beyond what is provided in Federal provisions. For example in the Rocky Mountain West, Wyoming, Montana, and North Dakota have laws that require the oil and gas company to compensate surface owners for a loss in land value from energy development. Colorado and New Mexico have been considering, but have not passed, similar legislation.

## **II. Energy Policy Act of 2005 (P.L. 109-58), Section 1835**

### **SEC. 1835. SPLIT-ESTATE FEDERAL OIL AND GAS LEASING AND DEVELOPMENT PRACTICES.**

(a) Review- In consultation with affected private surface owners, oil and gas industry, and other interested parties, the Secretary of the Interior shall undertake a review of the current policies and practices with respect to management of Federal subsurface oil and gas development activities and their effects on the privately owned surface. This review shall include—

(1) a comparison of the rights and responsibilities under existing mineral and land law for the owner of a Federal mineral lease, the private surface owners and the Department;

(2) a comparison of the surface owner consent provisions in Section 714 of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1304) concerning surface mining of Federal coal deposits and the surface owner consent provisions for oil and gas development, including coalbed methane [natural gas] production; and

(3) recommendations for administrative or legislative action necessary to facilitate reasonable access for Federal oil and gas activities while addressing surface owner concerns and minimizing impacts to private surface.

(b) Report- The Secretary of the Interior shall report the results of such review to Congress not later than 180 days after the date of enactment of this Act.

### III. Rights, Responsibilities, Statutes, Regulations, and Policies

Section 1835(a)(1) of the Energy Policy Act of 2005 directed the Secretary of the Interior (Secretary) to include a comparison of the rights and responsibilities under existing mineral and land laws for the owner of a Federal mineral lease, the private surface owners, and the Federal government as part of the review of split estate oil and gas leasing and development practices. Section 1835(a)(2) also directed the Secretary to provide a comparison of the surface owner consent provisions in Section 714 of the SMCRA, which addresses surface mining of Federal coal deposits, and provisions in place for oil and gas development, including coalbed natural gas production. This section provides background information and an overview of the authorities guiding the BLM's management of Federal oil and gas resources. A comparison of rights and responsibilities are found in Appendix A; more detailed information on current and pending statutes, regulations, and policies, and provisions guiding the mining of coal deposits under private surface compared to oil and gas development can be found in Appendices B and C, respectively.

#### A. Overview

The BLM manages approximately 700 million acres of subsurface mineral estate nationwide, including approximately 58 million acres where the surface is non-Federal. In many cases, the surface rights were severed under the provisions of the Nation's homesteading laws. The following Federal laws, regulations, and BLM policy directives give managers the authority and direction for administering the development of Federal oil and natural gas resources beneath privately owned surface:

- Coal Lands Acts of 1909 and 1910
- Agricultural Entry Act of 1914
- Stock-Raising Homestead Act of 1916
- Mineral Leasing Act of 1920 and amendments
- Federal Land Policy and Management Act of 1976
- Onshore Oil and Gas Orders No. 1 and 7
- Oil and Gas *Gold Book*
- The BLM's Instruction Memoranda, Handbooks, and Manuals

Under those laws, regulations, and procedures, the leasing and development of Federal oil and natural gas resources occur in the following four basic phases:

- Land Use Planning and Lease Sales
- Permitting and Development
- Operations and Production
- Plugging and Surface Reclamation

In each phase, the BLM, the lessee/operator, and the private surface owner have rights, responsibilities, and opportunities.

Parcels of land or mineral estate "open" for leasing under the terms of a BLM land use plan may be nominated for leasing by members of the public. The BLM reviews every nomination to consider

new information and to ensure that leasing the parcel conforms with the terms of the land use plan, which was developed with broad public input. The BLM ensures application of appropriate stipulations prior to offering lands for leasing.

The primary term for a Federal oil and gas lease is 10 years. This primary term can be extended by production or various extension privileges outlined under 43 CFR 3107. A lease gives the lessee or designated operator the right to enter and occupy as much of the surface as is reasonably required to explore, drill, and remove the oil and natural gas resource on the leasehold. This right is subject to stipulations attached to the lease and compliance with applicable nondiscretionary statutes such as the National Historic Preservation Act (NHPA) and the Endangered Species Act (ESA). The BLM works to encourage coordination and cooperation among all parties that have rights and responsibilities in split estate situations.

## **B. Comparison of Rights and Responsibilities**

A comparison of rights and responsibilities can be found in Appendix A. The BLM has also prepared a new brochure titled “Rights, Responsibilities, and Opportunities” which is found on the BLM’s Split Estate website at [www.blm.gov/bmp/Split\\_Estate](http://www.blm.gov/bmp/Split_Estate). The brochure identifies in plain language the rights, responsibilities, and opportunities for the BLM, lessee/operator, and private surface owner in split estate situations. The brochure was handed out at all of the split estate listening sessions. Due to the popularity of the brochure, the brochure was updated and reprinted and has been distributed to state and local BLM offices for further distribution to surface owners, lessee/operators, and local government agencies.

## **C. Current and Proposed Statutes, Regulations, and Policies**

Section 1835 of the Energy Policy Act requires the Secretary to undertake a review of the current policies and practices with respect to management of Federal subsurface oil and gas development activities and their effects on the privately owned surface. To address this review, the BLM prepared an overview of current and proposed statutes, regulations, and policies that guide management of oil and gas leasing and development on Federal mineral estate, which is presented in Appendix B. This overview was offered to the public as part of the public outreach and consultation process conducted under Section 1835. Portions of this information were clarified as a result of comments and questions received from the public. The revised document is attached as Appendix B of this report.

In split estate situations, the BLM must comply with the provisions of the Act under which the surface was patented. For example, patents issued under the Stock-Raising Homestead Act of 1916 reserved the coal and other minerals, along with the right to prospect for, mine and remove the same, and were issued subject to the disposition, occupancy, and use of the land as outlined in the Act. The BLM must also comply with the provisions in the Mineral Leasing Act of 1920 and various regulations regarding land use planning, leasing, bonding, operations, and reclamation. Operator guidance for surface operations was recently updated in the Oil and Gas “Gold Book” found at [www.blm.gov/bmp](http://www.blm.gov/bmp). The BLM also operates under the policy outlined in Washington Office Instruction Memorandum 2003-131, Permitting Oil and Gas on Split Estate Lands and Guidance for Onshore Oil and Gas Order No. 1. The BLM is currently in the regulatory process of updating Onshore Oil and Gas Order No. 1.

#### **D. Comparison of the Surface Owner Consent Provisions in Section 714 of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1304)**

Section 1835 of the Energy Policy Act of 2005 directed the Secretary to provide a comparison of the surface owner consent provisions found in Section 714 of the SMCRA concerning surface mining of Federal coal deposits and the surface owner consent provisions for oil and gas development, including coalbed [natural gas] production. Appendix C contains the full comparison.

Under the provisions of Section 714 of SMCRA, the BLM is required to notify the surface owner and obtain the surface owner's consent prior to leasing Federal coal for surface mining. Surface owner consent is not required for underground mining. In contrast, there are no provisions for obtaining surface owner consent prior to leasing for oil and gas in either the Stock-Raising Homestead Act of 1916 or the Mineral Leasing Act of 1920, as amended or any other statutes regulating Federally reserved minerals.

The short-term impact to the surface owner from surface mining coal is substantially greater than the impact of developing oil and natural gas resources. Oil and gas operations occupy a smaller footprint on a piece of ground, compared to coal mining, and can often be located in an area that allows for minimal interruption to the surface owner.

Language from Section 714 of SMCRA is presented in Appendix C, as well as a side-by-side comparison of the provisions in Section 714 and those governing current oil and gas leasing and development operations. Additional consent provisions found in SMCRA, with no equivalent oil and gas provisions, are also outlined.

## IV. Consultation

As directed by Section 1835 of the Energy Policy Act of 2005, a review of split estate Federal oil and gas leasing and development practices was conducted in consultation with affected private surface owners, the oil and gas industry, and other interested parties. This section outlines the process used to conduct this consultation and summarizes effects on privately owned surface identified because of this consultation effort.

### A. Overview of the Consultation Process

Section 1835 of the Energy Policy Act of 2005 directed that the review of split estate Federal oil and gas leasing and development practices by the Secretary was to be conducted “In consultation with affected private surface owners, oil and gas industry, and other interested parties....” As a result, a variety of opportunities was provided to engage the public in meaningful dialogue to elicit a comprehensive review and develop recommendations to address critical split estate issues.

Information posted on the BLM’s website at [www.blm.gov/bmp](http://www.blm.gov/bmp) identified various options for providing comments and recommendations to the BLM. Two draft documents were available to the public on the website to help focus comments: (1) a comparison of the rights and responsibilities under existing mineral and land laws for the owner of a Federal mineral lease, the private surface owners and the Department; and (2) a comparison of the surface owner consent provisions in Section 714 of the SMCRA concerning surface mining of Federal coal deposits and the surface owner consent provisions for oil and gas development. These documents were used to facilitate an understanding of current roles and responsibilities of the BLM, industry, and surface owners as well as provide a comparison of consent provisions differing between coal and oil and gas development. The public was offered an option to type recommendations directly into the two documents using the “Track Changes” feature in Microsoft Word and e-mail the documents to the BLM or to submit individual comments via e-mail. Comments were accepted via e-mail at [splitestate@blm.gov](mailto:splitestate@blm.gov) from December 23, 2005, through April 1, 2006. Three thousand two hundred and forty-eight e-mails containing comments were received; 3,083 of these e-mails were nearly identical, while 165 individuals provided unique submissions.

A *Federal Register Notice*, published on February 15, 2006, announced the BLM’s intent to convene listening sessions. Subsequent news releases and e-mails announced dates, times, and locations. The BLM compiled and maintained an extensive e-mail notification list of individuals and groups who were concerned about split estate issues. The list included Federal, state, and local government officials; oil and gas industry representatives; environmental organizations; surface owners; and surface owner organizations. Listening sessions were held in four Western States and the District of Columbia in March of 2006 to provide forums for interested parties to address the BLM. Locations included Albuquerque, New Mexico (March 20), Grand Junction, Colorado (March 22), Casper, Wyoming (March 24), Miles City, Montana (March 27), and Washington, D.C. (March 31). All locations except Washington, D.C., provided both an afternoon and evening session.

At each session, BLM distributed the Split Estate brochure and presented a historical perspective PowerPoint on the creation of split estate, other background information on oil and gas leasing and development, and on the rights, responsibilities, and opportunities of the BLM, lessee/operator, and surface owner under current Federal laws, regulations, and policies. The listening sessions permitted any individual who wanted to address their issues and concerns to a panel of national, state, and local BLM officials. The BLM State Directors or their representatives attended the sessions convened in New Mexico, Colorado, Wyoming, and Montana. More than 360 people attended the listening sessions, and 102 speakers offered comments to the panel. Appendix D details attendance at the listening sessions.

A comment review team comprising subject matter experts met in Denver, Colorado the week of April 10, 2006, and evaluated the recommendations resulting from this consultation process. The team included the disciplines of geology, petroleum engineering, mineral leasing, natural resources, land use planning, environmental analysis, and management. The Department of the Interior Solicitor's Office in Washington, D.C. provided legal advice. Appendices E and F present the comments received from the public on the split estate issue via e-mail and at the listening sessions, respectively.

## **B. Summary of Issues**

*The BLM should not impose a national solution to split estate issues and instead allow local, voluntary efforts to move forward.*

-- Independent Petroleum Association of America

*Voluntary programs do not address the issue or solve most conflict problems. Surface use and damage agreements must be required between surface owners and lessees or operators prior to any occupancy of the surface for oil and gas development.*

-- Bill Humphries, Lindrith, New Mexico

*The voluntary compromise approach is much preferable to any legislated solution that cannot provide for individual nuances, needs and situations.*

-- ConocoPhillips

Of those who commented, two major perspectives—those of a majority of the oil and gas industry and those of a majority of private surface owners—emerged because of the consultation process. Most oil and gas industry comments advise the BLM to move with caution when considering changes to current processes and believe that in the majority of instances, current procedures are working well, with most in the industry implementing “Good Neighbor” policies. Most surface owners expressed concern over current processes, especially regarding early notification and communication with the BLM and industry representatives, as well as issues related to protection of and compensation for loss and damage to surface resources and land values. From the perspective of the surface owner, the ability for an operator to “bond on” with a 3814 damages Bond when a surface owner agreement is not reached places the surface owner in a limited negotiating position. Oil and gas industry representatives point out that “bonding on” is a relatively rare occurrence and is only done after diligent and good-faith efforts to come to an agreement have failed.

Conflict between existing and pending state surface-owner protection statutes and current Federal laws and regulatory requirements has also moved to the forefront of the split estate debate. In states

without surface-owner protection laws, such as New Mexico and Colorado, protections afforded by the Federal requirements were relatively welcome by surface owners. In states with surface-owner protection laws, such as Wyoming, current Federal protections are seen by some surface owners as less protective than state protections and are not as welcome where they conflict with state protections.

### **C. Effects on Privately Owned Surface**

*Historical problems with split estates have centered around lack of notice to the surface owner of the imminent disruption of surface operations and the failure of the mineral lease holder to take into account the surface owner's reasonable needs and desires. In other instances, the impacts of mineral development have negatively affected the planning and response capabilities of the local governmental entity.*

-- Mesa County officials, Grand Junction, Colorado

*Beyond and along with the loss of our own personal wilderness, one of the worst things about this (oil and gas development) is the total loss of privacy. The sheer volume of people and noise becomes more than you can stand.... It is time they (the companies) start giving back, if not to the people, at least to the land. We have been here a long time and plan to outlast the oil and gas industry. We know the land will be forever changed. But, if this is handled properly now, we will eventually have a viable ranch in a semi-wild condition once more.*

-- Jon Hill, Cripple Cowboy Cow Outfit, Inc., Rangely, Colorado

*If surface owners and mineral lessees are to make their situation work, it is essential that the mineral lessee respect the rights and concerns of the surface owner, and vice versa.*

-- American Farm Bureau

*As industry and communities reap the profits from gas drilling, many landowners are being left out. These people bear the brunt of development, have their lives and land changed forever, and receive little if any compensation. This is a fairness issue. The single richest industry in the nation can afford to do better.*

-- Peggy Utesch, New Castle, Colorado

Section 1835 of the Energy Policy Act of 2005 requires a review of current policies and practices with respect to management of Federal subsurface oil and gas leasing and development and their effects on the privately owned surface. Public comments received during the consultation process expressed concern related to several types of effects on both privately owned surface and private landowners, summarized below. Concerns generally revolve around: (1) disturbance of resource values that exist on the landscape; (2) changes in quality of life for the landowner as a result of increased activity or interest, and (3) loss of economic value, either from the loss of intangible values such as solitude or “personal wilderness” or resulting from the lack of compensation viewed as adequate by the landowner.

Concerns identified by those who commented are summarized as follows:

- Increased effort on the BLM's part to speed oil and gas drilling has resulted in decreased efforts in inspection and enforcement, which has resulted in harmful effects to privately owned surface by activities associated with the Federal mineral estate.
- New oil and gas development, coupled with older activities, is contributing to increased erosion, water quality issues, and the spread of noxious weeds.
- Direct effects from development, including the number of roads, traffic, noise and dust, are increasing as activity increases.
- Wildlife habitat is being negatively affected as new development spreads onto private surface lands.
- Bare ground left around wells is a problem, and becomes more problematic as the number of wells increases—a cumulative impact.
- Coalbed natural gas wastewater discharges can and do affect downstream landowners, causing widespread damage to soils and vegetation that extends far beyond the immediate “footprint” of the development.
- Intrusions on private surface lands have more impact than intrusions on Federal surface lands since a private landowner is involved, whereas Federal surface is unoccupied.
- There is a total loss of privacy that results from oil and gas development, including the presence of oil and gas personnel, archaeologists, wildlife biologists, plant specialists, etc., on private land.
- Information collected during the studies conducted on private surface lands in order to authorize oil and gas development (in particular, cultural resource, wildlife, and sensitive plant inventories) often results in increased interest by members of the public and attracts visitors, which can reduce the privacy enjoyed by the private surface owner.
- Results of particular environmental studies may have a continuing effect on the surface owner in regard to proposals for other land uses after the permitting for oil and gas development has been completed.
- There is no fair method of compensation for the surface owner for impacts such as road construction and associated traffic.
- The amount of truck traffic and number of drill rigs, along with the construction and noise, have caused landowners to give up trying to use property as a rustic retreat or for hunting purposes.

The review conducted under Section 1835 of the Energy Policy Act of 2005 has taken into account the concerns expressed by private surface owners in development of the recommendations included in this report to Congress.

## V. Recommendations

### A. Recommended Changes by Category and Issue

*We have found that factual and timely communication between the surface owner and the operator is the best answer to any problem(s) confronting the two parties. Trust and dialogue are what resolve potential differences between parties, and this is best fostered through a flexible framework of regulation. We believe that the existing BLM policy...sets out that framework and does not require any additional layers of rule or regulation.*

-- Yates Petroleum Corporation

*It is shortsighted to not require mineral companies to adequately compensate surface owners beyond simple loss of forage values. In the business and environmental climate of the 21<sup>st</sup> century it makes sense to require mineral operators to notify and consult with landowners prior to operations beginning and then to fairly and adequately compensate them for the values found on the land today.*

-- Jim Hellyer, Hellyer Limited Partnership, Lander, Wyoming

*The Bureau of Land Management needs to look at the current regulatory practices and see if changes are necessary. The real problem may lie in the lack of implementation and enforcement of current regulations. Granted there may need to be more emphasis on certain issues or a modification of the process in which they are implemented but the foundation is there.*

-- Rand French, Staff Biologist, Marbob Energy Corporation

### B. Overview

In Section 1835 of the Energy Policy Act of 2005, Congress directed the Secretary to make recommendations for administrative or legislative action related to management of the split estate. The recommendations and implementation actions that follow were identified as being necessary to facilitate reasonable access for Federal oil and gas activities while addressing surface owner concerns and minimizing impacts to private surface.

A review of current policies and practices with respect to split estate oil and gas leasing and development was conducted in consultation with private surface owners, the oil and gas industry, and other interested parties to identify recommendations for consideration. For the purpose of this report, surface owners are individuals or entities, other than governmental agencies, that who hold title to surface lands underlain by Federal mineral estate.

Administrative action can take two forms. Interior Department agencies such as the BLM routinely provide internal direction to Field Offices through Instruction Memoranda, Handbooks, and Manuals or may provide public outreach through news releases and brochures. The BLM may also implement, through a public process, regulations that provide requirements to agency personnel, oil and gas industry and the public. Changes to laws, such as the Stock-Raising Homestead Act of 1916, would require legislative action by Congress.

The following issues reflect those that were identified by the public as a result of consultation with private surface owners, the oil and gas industry, and other interested parties and were determined by the BLM to be suitable for implementation. The BLM evaluated the issues and developed a variety

of recommendations and implementation actions. Each issue/recommendation identifies whether the implementation action would result in a policy or regulatory change or would involve additional BLM outreach activities. The BLM intends to implement all actions contained within this Chapter.

The implementation actions identified in this Chapter are administrative in nature. Congress asked the Secretary to consider whether legislative changes would also be necessary. The BLM does not believe legislative changes are warranted. The abundance of administrative actions proposed in this Chapter are sufficient to address split estate issues in a reasonable and effective manner. As requested by Congress, the BLM's proposed administrative actions will facilitate reasonable access for Federal oil and gas activities while addressing surface owner concerns and minimizing impacts to private surface.

The issues, recommendations, and implementation actions outlined below are presented in eight categories. These include:

- Awareness
- Land Use Planning
- Leasing
- Application for Permit to Drill (APD)
- Best Management Practices (BMPs)
- Surface Use Agreements
- Inspection and Enforcement
- Reclamation

## 1. Awareness

**Issue 1:** There is a need to further inform surface owners and operators of their rights and responsibilities regarding Federal leasing and oil and gas operations on split estate lands.

**Recommendation:** Develop a consistent set of outreach tools to inform surface owners and operators on the BLM's leasing and development program.

### Implementation

**Outreach:** Conduct outreach and provide informational materials to industry groups and associations, surface owners, real estate and title companies and professionals, and other entities. Work through the BLM's Resource Advisory Councils (RACs) to further identify local split estate issues and formulate local solutions.

**Outreach:** Continue to update, expand, and distribute the Split Estate brochure.

**Outreach:** Advertise the availability of fluid minerals leasing and development information hosted on the BLM's external websites through the use of press releases and other media outlets.

**Policy:** Include in competitive sale notices an informational notice regarding the BLM requirements for conducting operations on split estate.

**Issue 2:** Sellers of surface estate may not be disclosing the nature or existence of severed mineral estate, either leased or unleased, underlying their property.

**Recommendation:** Recommend to state governments that they require sellers to disclose outstanding mineral reservations and the terms to purchasers prior to the sale of a property.

### **Implementation**

**Outreach:** Conduct outreach with states and local governments to:

- Encourage the real estate industry to support higher disclosure standards for split estate situations.
- Encourage consistent title recordation requirements.
- Educate title companies, real estate professionals, bar associations, and regulators regarding the implications of split estate and nuances of Stock-Raising Homestead Act conveyances.

## **2. Land Use Planning**

**Issue 3:** There is a need to encourage participation on the part of private surface owners in the land use planning process, particularly in the development of oil and gas lease stipulations for private surface lands. Surface owners would like to be notified about oil and gas leasing and development at the beginning of the land use planning stage.

**Recommendation:** Increase notice to private surface owners on BLM's land use planning process with the help of cooperating agencies or local governments. Use local government cooperators to facilitate and encourage involvement of surface owners in the land use planning process.

### **Implementation**

**Outreach:** Encourage BLM State and Field Offices to meet with local government officials to discuss ways to involve surface owners in the land use planning process.

**Outreach:** Use existing authorities to publish notices, including paid advertising, if necessary, to ensure the BLM's land use planning process, including the opportunity for public involvement, is communicated to the public.

**Policy:** All legal notices and public outreach materials announcing the initiation of land use plans must include a statement that the plan decisions will address split estate minerals when this is the case.

## **3. Leasing**

**Issue 4:** Surface owners would like to be contacted when the BLM is leasing Federal mineral estate underlying their property. Notification is requested when parcels are nominated and offered on a competitive lease sale.

**Recommendation:** Continue to use the current process of posting lease sales on the BLM website, but increase media notification to inform the public of the availability of leasing information, and

work through local forums to explain the BLM's leasing process and, where practical, identify areas proposed for leasing.

#### **Implementation**

**Outreach:** Use widely available media, such as radio and television, to inform the public to the BLM websites that host lease sale information.

**Outreach:** Encourage Field Offices to work through local forums to maintain a dialog on local leasing activity. Where practical, identify areas of leasing interest.

**Issue 5:** Affected surface owners would like to be notified after leases are issued, including who has purchased the lease, and what stipulations are included on the lease.

**Recommendation:** The BLM State Offices should take steps to broaden public outreach following lease sales by providing additional notification to the public on the availability of sale results on the internet, LR2000, and in the BLM Field Offices. Lease documents should be made available upon request.

#### **Implementation**

**Outreach:** Encourage State Offices to:

- Grant easy access of lease sale results to the public.
- Distribute news releases, articles, brochures, etc., that announce where the lease sale results can be found.
- Ensure lease sale results are distributed to Field Offices for posting.
- Ensure external websites are updated with lease sale results.

### **4. Application for Permit to Drill (APD)**

**Issue 6:** Surface owners would like to be notified at the time an APD is filed and approved by the BLM and would like additional information regarding the operator's proposal. Surface owners would also like to be notified of Sundry Notices where there is additional new surface disturbance.

**Recommendation:** The operator, to better serve as a "Good Neighbor," should provide to the surface owner (via regular mail) a copy of the Surface Use Plan of Operations, cut and fill diagram, and location map. The operator should also provide to the surface owner (via regular mail) a copy of Sundry Notices involving new surface disturbing activities outside of existing disturbed areas. The operator should also provide to surface owner (via regular mail) a copy of the Conditions of Approval and any modifications to the Surface Use Plan of Operations.

#### **Implementation**

**Regulatory:** Modify the BLM regulations to specify that the operator must certify that it has provided a copy of the Surface Use Plan of Operation, cut and fill diagram, and location map to the surface owner concurrent with filing with the BLM.

**Regulatory:** Modify the BLM regulations to specify that the operator must certify that it has provided a copy of a Sundry Notice involving new surface disturbing activities outside of existing disturbed areas to the surface owner concurrent with filing with the BLM.

**Regulatory:** Modify the BLM regulations to specify that the operator must certify that it has provided to the surface owner a copy of the approved Conditions of Approval and any other modifications of the Surface Use Plan of Operations.

**Issue 7:** Occasionally the requirements placed on the operator by the BLM may be in conflict with the wishes of the surface owner. For example, the operator and the surface owner may have agreed on a particular well location, but the BLM asks for a change to the well location in order to reduce environmental impacts. Several individuals requested that the BLM not modify proposed locations of wells, flowlines, production facilities, etc., when there is a conflict with the provisions of the Surface Use Agreement negotiated between the surface owner and the operator.

**Recommendation:** The BLM should establish consistent policy in how it approaches changes to the proposed APD after the operator and surface owner have agreed to a separate Surface Use Agreement. If the BLM's requirements conflict with provisions in the Surface Use Agreement, the operator or surface owner should disclose that conflict at the onsite or to the BLM in writing, and the BLM should consider those conflicts in making its final decision.

### **Implementation**

**Outreach:** Update the Split Estate brochure and/or website to describe how conflicts between the BLM requirements and provisions in the Surface Use Agreement will be handled.

**Policy:** Update the Split Estate Instruction Memorandum to provide guidance to the BLM Field Offices on how to address conflicts between the BLM provisions and private Surface Use Agreements. (Refer to the "Non-Federally Owned Surface/Federally Owned Minerals" section of the *Gold Book*.)

**Issue 8:** The BLM requires that the operator enter into "good faith" negotiations with the surface owner to obtain a surface use agreement. To make the process work, it is also important for the surface owner to act in good faith. The term "good faith" is nebulous and should be defined.

**Recommendation:** Define "good faith effort" to help guide the operator and surface owner in negotiations and the Field Manager when reviewing the operator's proposed surface owner protection bond. Consider the recommendations provided by some members of the public on the elements of good faith. For example, good faith involves the lessee or its operator acting honestly and reasonably, as a Good Neighbor, in all circumstances. Provide an updated model of a Self Certification Statement for use by operators that reflects recommendations related to making a good faith effort to negotiate a Surface Use Agreement. In addition, the operator and surface owner should:

- Give genuine consideration to proposals from the other party;
- Maintain a level of active communication;
- Respond promptly to phone calls, letters and other forms of communication;
- Provide relevant and accurate information to the surface owner about the proposed activities and plan of operations (including likely future activities and plans of operations) and disclose all significant facts (such as the surface owner's right to protest and/or appeal a bond);
- Attend and constructively participate in meetings when they are arranged;
- Ensure that individuals with decision-making authority are involved in the negotiations;

- Put forward genuine offers and counter proposals, and be willing to put a verbal agreement into writing;
- Be open to considering and/or accommodating needs of the other party;
- Focus on the working collaboratively to draft provisions of the agreement; and
- Respect the negotiation process, especially in open forums.

#### **Implementation**

**Outreach:** Update the Split Estate brochure and/or website to include the elements of good faith negotiations between the surface owner and the operator.

**Policy:** Update the Split Estate Instruction Memorandum with the elements of a good faith negotiation.

### **5. Best Management Practices (BMPs)**

**Issue 9:** Some public comments recommended mandatory use of environmental Best Management Practices.

**Recommendation:** Ensure appropriate environmental Best Management Practices are applied on a case-by-case basis, since not all Best Management Practices are applicable to all situations.

#### **Implementation**

**Outreach:** Provide information on Best Management Practices to operators, surface owners, and BLM employees, with continued outreach to advertise the Best Management Practice website ([www.blm.gov/bmp](http://www.blm.gov/bmp)), Best Management Practice Awards, Gold Book revision, etc.

**Policy:** Re-issue the Best Management Practice Instruction Memorandum policy prior to its expiration.

### **6. Surface Use Agreements – A Private Agreement between the Surface Owner and the Lessee/Operator**

**Issue 10:** Surface owners should be notified of their rights prior to entering into Surface Use Agreement negotiations.

**Recommendation:** Encourage operators to provide a copy of the BLM Split Estate brochure to surface owners. Make the brochures readily available to operators and the public. This brochure provides surface owners with an overview of the rights and responsibilities of all parties, including rights to protest/appeal the bond amount.

#### **Implementation**

**Outreach:** Encourage operators to provide the split estate brochure to the surface owner prior to beginning negotiation of the Surface Use Agreement. The BLM offices should also bring the brochure to onsite meetings with the surface owner. Distribute the brochure during public and Resource Advisory Council meetings.

**Issue 11:** The Surface Use Agreement is the core of the relationship between the lessee/operator and the surface owner. The BLM does not review the Surface Use Agreement and does not enforce portions of the Surface Use Agreement that are not contained within the approved APD. Guidelines for Surface Use Agreements would be helpful to facilitate negotiations and even the playing field between operators and surface owners.

**Recommendation:** Encourage operator and surface owner trade groups to develop Surface Use Agreement templates for optional use. Elements of an agreement template might include:

- Procedure for obtaining surface owner input and preferences for the placement of roads, wells, drill pads, pipelines, power lines, compressor stations, and all other oil and gas operations improvements;
- Compensation to the surface owner for the use of its land and for damages to property that are caused by the operator's proposed operations, based on agreed-upon fee schedules;
- Comprehensive water management plan that includes provisions for the documentation and monitoring of water sources and for the proper handling of any discharged water (including produced water from coal bed natural gas development);
- Replacement of the water supply of a surface owner who obtains all or part of its supply of water for domestic, agricultural, or other legitimate uses from an underground or surface source that has been affected by oil and gas operations;
- Identify areas to be reclaimed and methods to be followed after the completion of drilling operations (interim reclamation);
- Procedure for obtaining reclamation release from the surface owner, and options for the surface owner to assume ownership of any of the operator's improvements;
- Procedures and methods for final reclamation; and
- Indemnification and binding effect clauses for the protection of the surface owner.

### **Implementation**

**Outreach:** Encourage operator and surface-owner trade groups to develop sample Surface Use Agreement templates.

## **7. Inspection and Enforcement**

**Issue 12:** Some surface owners stated that they would like to be notified of surface-related compliance issues that could affect their private surface resources and property values, including undesirable events; unfenced/unnetted sumps/pits; and damage to surface owner resources such as livestock, forage, ground or surface water, and soils.

**Recommendation:** Encourage Field Offices and/or operators to notify surface owners of undesirable events and compliance issues that could affect private surface resources and property values when first discovered by the BLM or reported to the BLM and during follow-up inspection and enforcement activities.

### **Implementation**

**Regulatory or Policy:** Develop a process and timeline for notification of the surface owner of undesirable events, compliance issues, enforcement actions, and the results of enforcement actions

that could affect private resources and property values.

## **8. Reclamation**

**Issue 13:** Some surface owners would like to be involved in the review and approval of final reclamation to ensure that their property is reclaimed.

**Recommendation:** Provide surface owners an opportunity (30 days) to provide input into final reclamation plans and approvals.

### **Implementation**

**Policy:** Revise the Split Estate Instruction Memorandum to clarify surface owner involvement with reclamation review and approval. Ensure Gold Book recommendations are applied consistently, which states that the Final Abandonment Notice (FAN) will not be approved by the BLM until reclamation work is determined to be successful by the BLM in consultation with the surface owner.

## VI. Issues and Recommendations Raised, But Not Adopted as Implementation Actions

Consultation with the public under Section 1835 of the Energy Policy Act of 2005 resulted in identification of a number of issues and recommendations that were considered, but were not adopted in this report. These issues and recommendations may be outside the scope of this review; already adequately addressed by current policies and procedures; contrary to the management philosophy of the agency; not in the interest of the public-at-large; or infeasible to move forward. This section outlines recurring issues and recommendations that were not adopted and provides a rationale as to why they are not forwarded to Congress as formal recommendations at this time. A complete list of issues and recommendations identified by the public can be found in Appendices E and F.

### A. Planning, Leasing, and Administrative Actions

**COMMENT:** There is the perception that Communitization Agreements would negatively affect surface owners. Some members of the public suggested that surface owners should be notified prior to the creation of Communitization /Unit Agreements and/or other nonsurface-disturbing lease operations. **RESPONSE:** These agreements and actions are administrative actions and not result in actions which will disturb the surface.

**COMMENT:** Comments suggested that spacing and density of wells should be addressed at the leasing stage. **RESPONSE:** Spacing and density of wells is addressed during the production stage rather than at the leasing stage. At the time of nomination of a parcel and leasing, insufficient geological and reservoir information is known to make these decisions.

**COMMENT:** It was suggested that the posting period for lease sales be extended from the current policy of 45 days to 60 days or 90 days prior to the sale. **RESPONSE:** The 45-day posting period is contained in 43 CFR 3120.4-2. Extension of the 45 days is realistic in some BLM State Offices but may not be in others. Several BLM State Offices have extended the public review time. One state holds up to six lease sales a year, and the workloads associated with post-sale processing and preparation of upcoming sale lists do not permit lengthening the review time.

**COMMENT:** Comments suggested that the BLM provide direct, written notification to specific surface owners prior to leasing. It was also suggested that the BLM not accept or consider any lease nominations that do not include documentation that the surface owner was notified. **RESPONSE:** The BLM has made recommendations to expand notification and conduct additional outreach to the public. Identification of individual surface owners involves detailed courthouse research and is a significant undertaking. Prior to lease nomination, operators generally do not complete title research and the BLM does not have the capacity to complete this work in most offices.

**COMMENT:** Lease sale notices, in general, do not identify parcels with private surface ownership, and thus the public and lessees are often unaware of which parcels may have split estate issues. **RESPONSE:** Lease sale notices identify parcels by county and legal description. Individual surface owners may use their legal descriptions to search the available lease maps.

**COMMENT:** It was suggested that local governments should be consulted at all stages of oil and gas leasing and development and receive notice of mineral leasing decisions, be afforded the opportunity to participate in onsite inspections, provide recommendations on necessary mitigation, and be consulted during pre-reclamation and post-reclamation approval. **RESPONSE:** The BLM's land use planning stage affords local governments the best opportunity to consult with the BLM on appropriate resource allocations and stipulations to be applied to oil and gas leasing and development on both Federal lands and on split estate. In split estate situations, the BLM serves as the Federal permitting agency and can provide the necessary expertise as the operator and surface owner work through the oil and gas leasing and development. The BLM provides numerous opportunities for local governments to be involved in the management of public lands and resources. However, requiring consultation and involvement from local governments in the conduct of onsite inspections, development of additional mitigation measures, and approval of reclamation could place an undue burden on those governments and the BLM. As a result, the leasing and permit approvals could be delayed.

**COMMENT:** Comments were made requesting that surface owner consent be required for leasing to occur, similar to provisions applied to coal leasing under the SMCRA. **RESPONSE:** A comparison of SMCRA to oil and gas leasing and development procedures has been provided in this report (see Appendix C). A consent provision is not recommended, given the lesser intensity of oil and gas development on a parcel of ground in comparison to coal development and the provisions in place to involve surface owners in oil and gas development negotiations to address surface impacts.

**COMMENT:** Setback stipulations should be applied to occupied dwellings to minimize or preclude impacts. **RESPONSE:** The BLM currently has the regulatory authority to move well locations away from occupied dwellings or to minimize or preclude impacts at the APD stage. In accordance with the regulations at 43 CFR 3101.1-2, moving the well up to 200 meters or rescheduling drilling by up to 60 days is always considered to be consistent with lease rights. Restrictions on development, not required to comply with the law, must be reasonable and consistent with lease rights granted. The BLM may impose greater restrictions when less stringent measures would be ineffective and the new measures do not render the recovery of fluid minerals infeasible or uneconomic, considering the lease as a whole. The BLM, the operator, and the surface owner may negotiate additional mitigation options.

**COMMENT:** The BLM should implement a policy to reunite surface with mineral ownership by offering either exchanges or direct sale to the surface owner. **RESPONSE:** Retaining Federal mineral estate in public ownership when it is potentially valuable for mineral development, "known mineral value," and has the potential to produce revenue for the public, is the policy reflected in Section 209 of the Federal Land Policy and Management Act (FLPMA).

**COMMENT:** It was suggested that the BLM should ensure that future land conveyances do not create split estate situations—if the surface is conveyed, the mineral estate should be conveyed. **RESPONSE:** Implementing this provision would not be consistent with the provisions of Section 209 of FLPMA. Section 209 requires the BLM to reserve the mineral estate in all land disposal transactions with the exception of land exchanges, when a determination of "known mineral value" guides whether the mineral estate is reserved or not.

**COMMENT:** An issue was raised that royalties should be conveyed to surface owners.

**RESPONSE:** It is a statutory requirement that the United States receive a 12 1/2 percent royalty of production on public lands leases. Surface owners have the opportunity during negotiation of a Surface Use Agreement to request a royalty from the lessee/operator. It is not in the public's interest to allow for payments to surface owners from the public's royalty. In addition, one-half of the royalty received is conveyed back to the state.

**COMMENT:** The suggestion was made that surface owners should receive a share of monetary penalties levied by the BLM for incidents of noncompliance related to surface disturbance.

**RESPONSE:** It would not be appropriate for penalties for violation of Federal requirements to be paid to private parties. These penalties are collected to address the Federal violation. However, surface owners can negotiate a set a penalties in the Surface Use Agreement.

**COMMENT:** Some surface owners requested that they be compensated by the operator for loss of property value and damage to tangible improvements in addition to those related to stockraising.

**RESPONSE:** Federal law does not provide for this. Many operators already provide this type of compensation. Montana, Wyoming, and North Dakota have existing laws that address these compensation issues, and Colorado and New Mexico are currently working on proposed legislation.

## **B. Notice of Staking and Application for Permit to Drill**

**COMMENT:** It is established that the surface owner is invited to the onsite meeting. Some commenters also requested that the operator be required to notify the surface owner prior to staking, surveying, and other inventory work conducted in preparation for the onsite meeting.

**RESPONSE:** Current guidance recommends that operators notify surface owners of these planned activities, even though they are generally non-surface disturbing. Given the number of circumstances (such as absentee landowners, multiple owners of a single parcel, lack of timely response) that could hinder notification of a private surface owner and response back to the operator within reasonable timeframes, establishing a mandatory requirement for advance notification and response to these activities may not be practical. Operators must continue to work under "Good Neighbor" policies and in consideration of current BLM guidance in communicating with surface owners in good faith. Other recommendations regarding education of the public about oil and gas leasing and development processes, and increased outreach to inform the public of nominations and lease sale results, is expected to improve this communication as well.

**COMMENT:** It was suggested that an initial planning conference be convened between the operator, surface owner, and the BLM prior to the onsite meeting and prior to the filing of Notices of Staking and APDs to facilitate early interaction, broad development planning, and surface use conflict resolution. **RESPONSE:** The new oil and gas Gold Book and proposed revisions to Onshore Order No. 1 recommend that the operator provide early notification to the surface owner. The BLM does require the operator to engage in good faith negotiations with the surface owner prior to approval of the APD by the BLM. While there are many benefits to initial planning conferences and the BLM encourages early these conferences, the BLM does not propose placing a one-size-fits-all planning conference requirement on the operator prior to filing a Notice of Staking or APD due to varying circumstances (such as limited development or exploratory wells). The purpose of the Notice of Staking and onsite meeting process is to allow for some degree of early planning.

**COMMENT:** It was suggested that landowners should be given no more than 10 days to respond to an invitation to participate in onsite inspections. **RESPONSE:** Given the number of site-specific situations and timing issues that could occur, the BLM is not recommending a specific timeframe be established for response from a surface owner. The BLM Field Offices will make good faith efforts to invite the surface owner to onsite inspections and determine a reasonable amount of time for surface owners to respond, based on local circumstances. Operators can assist in expediting these efforts by initiating early coordination with surface owners.

**COMMENT:** Some surface owners requested that they be offered the opportunity to participate in the consultation process with the U.S. Fish and Wildlife Service when required under the ESA and receive the same incidental takings protection that the operator and the agency receive.

**RESPONSE:** There is no formal mechanism in law or regulation that will grant the surface owner “incidental take” coverage as part of the Federal action since the surface owner is not an “applicant” under the regulations (see below). Surface owners may seek protections from the prohibitions of incidental take from the U.S. Fish and Wildlife Service through Section 10 of the ESA. However, the BLM’s policy does not explicitly prohibit surface owner participation in the consultation process, but there is no formal procedure of how or when this may occur. A person is considered an applicant if, as a prerequisite to conducting an action, the person requires the authorization or approval of the Federal agency. If a person is an applicant, that person and the Federal agency are subject to the requirements of Section 7 of the ESA. In the case of oil and gas development, the lessee (operator) is an applicant seeking the authorization and approval of the Federal agency. Because the surface owner’s actions are not subject to Federal authorization or approval, the surface owner is not an applicant nor is there a “Federal nexus” that requires the surface owner’s actions to be considered in the Section 7 consultation process. If the private landowner wishes to conduct activities that might harm listed species, the landowner must obtain a permit from the U.S. Fish and Wildlife Service following current procedures in place for private landowners. These procedures include a variety of tools (Habitat Conservation Plans, Safe Harbor Agreements, etc.) that allow for activities and development on private land while offsetting harmful effects.

**COMMENT:** Some surface owners believe that they should be able to deny access to split estate lands for completion of wildlife inventories for both listed and proposed threatened and endangered species and non-listed species. **RESPONSE:** Approval of an APD is a Federal action and is, therefore, subject to the consultation and conference requirements of Section 7 of the ESA if a determination of “May Affect” for ESA-listed or proposed species is made. Section 7 consultation must be completed using the best scientific and commercial information available. While a private owner’s wishes should be considered, they cannot overrule requirements of the statutes and their implementing regulations. The BLM has the authority to conduct surveys and assessments on the split estate lands when processing the APD. If the surface owner refuses to grant access to split estate lands to complete wildlife inventories for listed and proposed species, the BLM may enter into consultation with the information that is available. Based on case law, the U.S. Fish and Wildlife Service, when faced with uncertainty due to lack of specific information will generally grant the benefit of the doubt to the protection of the listed species. Operators and surface owners must recognize that for ESA-listed species, the U.S. Fish and Wildlife Service’s response to Section 7 consultation requests may include conservation and protection measures for a threatened and endangered species assumed to be present. For non-listed species, the BLM will proceed through the National Environmental Policy Act review process in a timely manner using other sources to obtain the best available species and habitat information.

**COMMENT:** Some surface owners believe that they should be able to deny access to split estate lands for completion of cultural resource inventories for the purpose of complying with the identification stage of consultation under Section 106 of the NHPA and other relevant laws.

**RESPONSE:** Approval of an APD is a Federal action with the potential to affect historic properties and is, therefore, subject to the consultation requirements of Section 106 of the NHPA. The mineral estate is dominant and the Federal lessee has the right to access the property in order to comply with legal prerequisites to developing the minerals.

**COMMENT:** It was suggested that a provision regarding the surface owner denial of cultural resources inventories be added specifying, if inventory is not allowed by the private surface owner prior to the approval of an APD on split estate lands, archaeological monitors would be required to accompany the drilling survey party to assure that the development does not damage historic resources. **RESPONSE:** This is already an allowable option the BLM and State Historic Preservation Officer may currently consider in Section 106 consultation, but not one that is always acceptable.

**COMMENT:** Some comments indicated that the act of leasing is an undertaking under the NHPA requiring compliance with Section 106 of the Act. The commenters stated that the BLM currently does not conduct compliance with Section 106 requirements until the APD stage, and must change this approach. **RESPONSE:** The BLM recognizes leasing as an undertaking under Section 106 of the NHPA in Washington Office (WO) Instruction Memorandum (IM) 2005-003. The NHPA regulations and decisions of the Interior Board of Land Appeals recognize that consultation can be phased, and the BLM accordingly conducts appropriate levels of consultation prior to leasing (preferably at land use planning) and reserves the balance of consultation to perform before approving development. The BLM also may use a lease stipulation to reserve its authority to take all steps necessary to avoid adverse effects at the permitting stage. In WO IM 2003-147, the BLM recommends the use of “block surveys” early in the process. In addition, a BLM Task Force on Section 106 has developed and disseminated an action plan to continue to address these concerns (WO IM 2005-227). Since the BLM is already engaged in this issue, additional specific recommendations have not been developed in this report.

**COMMENT:** Some expressed concern that the requirement placed on the BLM to comply with the National Environmental Policy Act on split estate lands was unnecessary where the operator and the surface owner agreed on surface management and was a cause of delay in approving permit approvals. **RESPONSE:** The BLM must comply with the NEPA requirements to look at surface and subsurface impacts. To exempt APD approvals on split estate from compliance with National Environmental Policy Act where the surface owner and the lessee/operator have entered into a Surface Use Agreement addressing management of the surface during energy development operations would require a legislative change.

**COMMENT:** The public suggested that directional drilling should be required in order to minimize impacts on private surface lands. **RESPONSE:** Current procedures provide opportunities to protect private surface resources at the Notice of Staking and APD stages when location alternatives and environmental Best Management Practices are considered. A blanket provision to require directional drilling may not be geologically and technically feasible in some cases and may be excessive when a number of acceptable alternatives, such as the use of environmental

Best Management Practices and moderate shifting of the well location, are often available to mitigate impacts as a result of standard negotiations between the operator and the surface owner.

**COMMENT:** Comments suggested that all Plans of Development should protect municipal watersheds, and that plans should be developed for geographic areas in order to provide this protection. Some commenters suggested that lands nominated within and adjacent to municipal drinking watersheds, whether in a split estate situation or fee simple, should be withdrawn and not offered for competitive lease sale for a period not to exceed 12 months. During this time, the Federal administrators of the mineral estate, surface owners, holders of municipal drinking water rights, holders of other surface and groundwater water rights, and other affected interests (including the oil and gas industry), would meet and prepare a detailed plan of development as to how the surface property would be developed while protecting the surface and subsurface drinking water supplies and surface and groundwater supplies used for agriculture and other uses. Federal minerals nominated under specific parcels would, then, be amended and/or removed permanently from future lease sales, as appropriate, according to the Plan of Development. **RESPONSE:** This issue is broader than the issue of split estate management and, therefore, is not specifically addressed in this report. However, the appropriate time to initiate these discussions is during the land use planning process where decisions are made as to whether lands within a Field Office jurisdiction are available for leasing, and what stipulations are necessary on lands that are available to protect resource values, including municipal water sources.

### C. Bonding

**COMMENT:** Public comments requested that the \$1000 minimum for a 3814 damages Bond should be increased. **RESPONSE:** Current regulations set the **minimum** at \$1000. Actual bond amounts are proposed by the operator, reviewed and approved or disapproved by BLM with an opportunity for the surface owner to object and appeal. The BLM conducts a case-by-case analysis of the operator's proposed bond and estimates actual damages when a good faith effort on the part of the operator has not resulted in a Surface Use Agreement between the operator and the surface owner. The bond is based on actual damages, and a change in this minimum bonding requirement would not offer greater protection.

**COMMENT:** It was suggested that an administrative hearing should be conducted prior to approving "bonding on." **RESPONSE:** It is unclear what additional benefit an administrative hearing would provide. The purpose of "bonding on" is to set aside sufficient funds to cover damages. Written documentation submitted to the BLM by the operator and surface owner in accordance with current "bonding on" policy is sufficient to determine the amount of damages. The operator and surface owner both have the opportunity to object to and to appeal the BLM's decisions.

**COMMENT:** Questions were raised regarding the ability of the lessee to enter upon the lease to conduct operations prior to acceptance of the 43 CFR 3814 bond by the BLM. **RESPONSE:** Guidance outlined in BLM Instruction Memorandum 2003-131 adequately addresses this issue in the attachment titled "Bond Processing Directions." Upon filing of the bond, a copy must be served on the surface owner, which begins a 30-day protest period. The bond will not be approved or accepted by the BLM before the end of this period, and therefore the APD cannot be approved before the end of this period. If a protest (objection) is received from the surface owner, but after

review the BLM finds the bond is sufficient, the surface owner is notified of the decision and informed of appeal rights, and the APD or Sundry Notice is approved concurrently. At this point, the operator may enter upon the lease to conduct operations, and operations may continue during the pending appeal.

**COMMENT:** The public commented that bonding does not provide adequate assurance of reclamation and that the BLM needs to offer better assurance to surface owners that reclamation will occur. **RESPONSE:** The BLM already performs 3104 damages Bond adequacy reviews and requests increases as necessary. A bonding policy Instruction Memorandum, WO-IM-2006-206, was issued to the field in 2006.

**COMMENT:** It was suggested that a program to provide technical and financial assistance to oil and gas producing states be established to help clean up orphaned or abandoned oil and gas wells on state and private land. **RESPONSE:** Additional work on this issue is being conducted per Section 349 (g)(1) of the Energy Policy Act outside of review of the split estate issue.

**COMMENT:** The regulations at 43 CFR 3814 do not allow for acceptance of a personal bond. They only allow surety bonds. **RESPONSE:** The BLM does not recommend changing the bonding requirements at this time, but may revisit this in the future.

**COMMENT:** It was suggested procedures should be developed that allow an operator to post a blanket Surface Owner Protection Bond in lieu of bonding by homestead patent. **RESPONSE:** Comments on split estate bonding identified the importance of tailoring 3814 damage Bond to site-specific situations; adopting a blanket approach to bonding would hinder the current coordination that occurs between the operator and the surface owner on a site-specific basis.

#### **D. Surface Use Agreements**

**COMMENT:** The public suggested that the BLM create a pilot project to allow for mediation between operators and surface owners when issues arise regarding compliance with Surface Use Agreements. **RESPONSE:** The BLM would be willing to provide a list of third party mediators, if requested. Surface Use Agreements are agreements between the operator and the surface owner, and mediation coordinated by the BLM may not be appropriate.

**COMMENT:** Some comments raised concerns regarding inconsistencies between state and Federal law, and in particular addressed concerns regarding indemnification for injury and damages (protection from lawsuits) when laws are inconsistent. **RESPONSE:** Indemnification is a matter between the operator and surface owner. Parties concerned about the applicability of state law could address this issue in the Surface Use Agreement if it is a concern between the two parties.

**COMMENT:** Surface Use Agreements should be recorded at the county courthouse to provide a record of the agreement when property changes hands. **RESPONSE:** State law, rather than Federal law outlines the types of documents that are required to be recorded in the county courthouses.

**COMMENT:** The comment was made that surface owners should be held harmless or indemnified for any loss, damage, or restriction of use placed on the surface if loss, damage, or

restriction of use occurs from the application of statutes such as the ESA. **RESPONSE:** The BLM cannot provide this assurance and does not administer the ESA, but only complies with its provisions. Surface owners may negotiate such provisions with the operator in regard to the activities proposed by the operator when the surface owner agreement is developed.

## **E. Inspection and Enforcement**

**COMMENT:** The public requested that the BLM make the inspection and enforcement program a priority and get it funded. One particular comment suggested the Secretary of the Interior certify to Congress that staff and budgets are adequate by October 1 of each year. **RESPONSE:** The inspection and enforcement program is a BLM priority. Section 362 of the Energy Policy Act of 2005 addresses the inspection and enforcement program and provides for increased compliance funding for years 2006 through 2010.

**COMMENT:** Some surface owners recommended that operators who repeatedly receive notices of noncompliance on split estate should face increased penalties. **RESPONSE:** It is not appropriate to establish a higher penalty based on the ownership of the surface. The BLM has a penalty schedule that is based on the severity of the infraction and failure to comply with BLM orders. The BLM policy identifies an increased inspection frequency for operators with a history of noncompliance and the BLM regulation identifies increasing penalties when an operator has failed to take corrective action. The BLM also has the ability to increase performance bonds based on a history of noncompliance.